

AN INTRODUCTION TO "THE BEST INTEREST OF THE STATE"  
Prepared for the State Administration, Public Employee Retirement Systems,  
and Veterans' Issues Interim Committee  
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October 28, 1999

## BACKGROUND

Although the phrase is used frequently and in many contexts, pinning down a working definition of "the best interest of the state" is quite elusive. Montana statutes refer to some form of the phrase in more than two dozen instances, yet the term itself is not defined in the MCA. Perhaps like beauty or obscenity, one simply knows it when one sees it? Nevertheless, a common understanding of what is the state's best interest and, particularly, how the interest is ensured is fundamental to a discussion of state contracting.

The National Association of State Procurement Officers (NASPO) defines the "best interest of the state" as follows:

***Best Interest of the State** (County or Municipality): The rationale granting a procurement official discretion in taking action most advantageous to the jurisdiction when it is impossible to delineate adequately a specific response by law or regulation. Case law affirms this discretion.*<sup>1</sup>

What the NASPO definition seems to suggest is that, absent a legal or procedural requirement or prohibition and barring arbitrary, capricious, or fraudulent action, "the state's best interest" is observable in or evidenced by a discretionary act of a procurement official. Hmmmm. Does that mean that if an act isn't required or prohibited, then it's in "the best interest of the state". Well, maybe.

Presuming that case law would provide some guidance, judicial records were reviewed to identify relevant Montana court cases. The lone, relevant Montana Supreme Court decision<sup>2</sup> identified refers to the concept:

... Therefore, we conclude that unlike the procurement laws on which the *Three Rivers* decision was based, the defendants [state] in this case were not required to award a contract to the "lowest bidder," nor were they absolutely required to award a contract based on any other sufficiently objective basis that a property interest was created which would support a due process claim

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<sup>1</sup> *State & Local Government Purchasing: Principles & Practices*; NASPO, Lexington, KY, 1997, p. 144. NASPO contrasts the best interest of the state with "Arbitrary, Capricious, or Fraudulent Action" and defines that term as "action by whim or caprice (or in case of fraud, in reasoned action); ungoverned action; the only grounds for a court to overrule or remand an administrative decision or ministerial action of a public purchaser.

<sup>2</sup> Staff attorney John MacMaster conducted the review and identified *ISC Distributors, Inc. v. Trevor*, 273 Mont. 185, 903 P.2d 170, (1995) as the lone, relevant case. He also commented that its relevance may be only marginal.

pursuant to 42 U.S.C. 1983. The defendants were simply required to award contracts based on what they subjectively concluded was in the State's best interest after taking into consideration various factors, including quality, expense, and technical adequacy. Neither the statutory nor regulatory criteria, nor the RFP, limited the defendants' discretion to a sufficient extent to create a property right pursuant to the *Three Rivers* decision, or any of its progeny. For that reason, and based on our prior conclusion that a property right will not exist where there is a broad discretion involved in the award of a benefit, we affirm the District Court's order dismissing ISC's claim that it was denied due process of law in violation of 42 USC 1983.

*ISC Distributors, Inc. v. Trevor*, 273 Mont. 185, at 194 (1995)

At least the Supreme Court cleared that up!

#### UPON FURTHER EXAMINATION

When listing the best interest of the state as one of the Department of Administration's "Top 10" issues, DOA staff identified three different stakeholders in the state's best interest: taxpayers, businesses, and government. Clearly, each of those groups has its own interests, but does each group's interest exclude the others' interests? If the interests are exclusive, then which one is the most important as a matter of public policy? Or, do the interests overlap? If there is overlap, where? Are shared interests necessarily good? The answers to these questions and others become increasingly important if the state's contracting policy, laws, and procedures are to ensure the state's best interest.

The groups identified by DOA staff -- taxpayers, businesses, and government -- are certainly among the stakeholders to be counted, but further clarification may be useful. For example: Who comprises the identified groups of stakeholders? Are there other groups of stakeholders, as well? If so, who are they?

To add complexity, how should the distinct interests of an individual or subgroup be prioritized within the general group and in light of the competing interests of other groups and their own subgroups and individuals?

<u>Taxpayers</u>	<u>Businesses</u>	<u>Government</u>
< Resident	< local, independent	< Executive, Legislative, Judicial
< Nonresident	< local, franchise	< elected, appointed, civil service
< By type of tax paid:	< small	< state
# property	< large	< local (non-school)
# personal income	< in-state (domestic)	< school (K-8, high)
# corporate income	< out-of-state (foreign)	< university system
# motor fuel	< other _____	< special jurisdiction (district)
# other _____	< other _____	< federal
# other _____	< other _____	< foreign
# other _____	< other _____	< other _____

### Taxpayers

In discussing the "best interest of the state", the interests of the taxpayer, i.e., lowest cost, would have to have the highest priority -- wouldn't they? Even if an assertion of taxpayer primacy is true (which, by the way, is not clear), those interests might vary depending on which taxpayer one is talking about. Take a hypothetical situation.

Assume that a state contract is awarded to a local business. Anticipating future state contracts, the business is sure to grow by expanding its buildings, adding equipment, and augmenting its workforce -- all of which is great news to the local economy and the local taxpayers. If, however, the product or service to be provided by the local business is more costly than could be obtained elsewhere, all other taxpayers outside the locality could suffer (at least differently if not more than the locals would suffer). Similarly, if the product or service to be provided by the local business is substandard or even very good but of less quality than could be obtained elsewhere, all other taxpayers could suffer or all consumers of the goods or services could suffer (compared to nonconsumers).

Similar scenarios could be concocted for any other the other taxpayers to be considered as stakeholders. Thus, it may become quite important to understand which taxpayer's interest is to have top priority.

### Businesses

Businesses also have a considerable stake in ensuring "the best interest of the state" when it comes to

contracting. Without ensuring that interest, some of the businesses' own interests could be diminished -- fewer or less profitable contracts, for example. But the interests of any individual business may be different from the interests of another business. Consider another hypothetical situation.

Acme, Inc. is a local, independent business that can provide a needed product or service to a governmental customer at a competitive price. SuperStore is a local, franchise business that can also provide a marginally higher-quality product or service to the governmental customer but at a slightly higher price, and MegaCorp is a national business that can also provide the product or service to the customer at a slightly lower price. Which of these businesses' interests should have priority over the others' if "the state's best interest" is the primary standard to be met? How does the interest of that business mesh with the interests of taxpayers?

### Government

The stake that "government" has in ensuring the best interests of the state is probably as diverse as the stakes that taxpayers and businesses have. After all, "government" is merely people trying to do what each believes needs to be done in order to meet certain goals and objectives (which may also vary depending on the position and role of the individual). At the very least, "government" wants to follow the law. Government also probably wants to ensure that the interests of taxpayers and businesses are protected (if not fostered and enhanced). Some in government want to ensure their future, e.g., get reelected. Others want to keep their jobs, help their respective clients/customers, excel at executing their duties and responsibilities, or change the world (even if only in some minuscule way).

What are the interests of government? Which of those interests should have priority? How does that interest compare to the interests of taxpayers or businesses? How do the interests of government integrate with the interests of taxpayers, businesses, or others?

### ASSESSING THE TERRAIN -- CHARTING A PATH

The best interests of the state are at the core of every state contract, but just how to identify or measure the interests remains an artful challenge. The definition provided by NASPO suggests that a procurement action that is not required or prohibited by law or is not arbitrary, capricious, or fraudulent is an action that is taken in the best interest of the state. The Montana Supreme Court has opined that the law in Title 18, chapter 4, MCA, simply requires the state to award contracts based on what the state's procurement professionals subjectively conclude is in the state's best interest after taking into consideration various factors, including quality, expense, and technical adequacy. Unfortunately, perhaps, the Court did not create a test whereby the interests of taxpayers or businesses were juxtaposed against

those of the state (i.e., government) or, for that matter, even a test among quality, expense, technical adequacy, and the other "various factors" considered in making a decision. Thus, the basic question remains: What is meant by the best interest of the state?

It may be beneficial, as a starting point, for the Legislature to provide some guidance to the public employees who are responsible for the procurement of products/goods and, particularly, services. A policy and purpose statement of legislative intent could provide a benchmark against which evaluation could be made. As the somewhat hackneyed management phrase -- "what gets measured is what gets done" -- suggests, providing some basis for comparison could lead to an ongoing examination of whether or not "the best interests of the state" are being ensured in state contracts.

SJR9/SBI-01.WPD